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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In Re:)
)
Petition for Declaratory Ruling or)
Rulemaking of Cellular Communications)
of Puerto Rico, Inc. To Determine Whether)
Competitive Bidding Procedures Should)
Be Used To License Certain Cellular)
Rural Service Areas)

RM-8897

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To: The Commission

COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("WWC")¹ hereby submits its comments in support of the request for a Petition for Declaratory Ruling or Rulemaking filed September 9, 1996 by Cellular Communications of Puerto Rico ("CCPR"). WWC supports the auctioning of all the unlicensed cellular Rural Service Area markets where the original tentative selectee (and in some instances the subsequent tentative selectee) has been disqualified and no license has been awarded to date - provided that the Commission first complete action in the pending proceedings for these markets.

¹ WWC, through its subsidiaries, holds numerous licenses to provide non-wireline cellular radiotelephone service ("cellular"), personal communications service ("PCS"), specialized mobile radio ("SMR") service, and paging and radiotelephone service ("paging") over a large portion of the western United States, including many rural areas. Additionally, WWC is the Interim Operator in the Nebraska 5 - Boone RSA ; Montana 3 - Phillips RSA; North Dakota 3 - Barnes RSA; Wyoming 4 - Niobrara RSA; and the Wyoming 5 - Converse RSA.

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SUMMARY

The Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),² granted the Commission authority to award licenses by competitive bidding rather than by lottery. Awarding the remaining unlicensed cellular RSA markets by auction will expedite long awaited service to the public as well as provide opportunities for all qualified entities with a sincere interest in serving a particular market to participate in acquiring a cellular license for that market.

The Commission should be mindful, however, that in order to ensure an equitable and economically viable auction, any cellular licenses awarded by competitive bidding ***must not be conditioned*** upon the final outcome of any Petition for Reconsideration or Application for Review of the disqualification of the initial tentative selectee's (or any subsequent tentative selectee's) application as indicated on the July 12, 1996 *Lottery Notice*.³ A bidding entity must be assured that the price it is willing to pay to construct and operate a cellular system comes with "no strings attached." An auction held for an "unconditioned" cellular license will result in the best market price for the license; avoid the speculation that has plagued the cellular industry for many years; and expedite service to the public. Thus, the Commission should complete its

² Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

³ The *Lottery Notice* specifically stated that "Applications that were dismissed as unacceptable for filing and have filed a Petition for Reconsideration or Application for Review will be conditionally included in the lottery pending final Commission action on the application." *FCC Public Notice*, FCC To Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which Previous Winner was Defective, Mimeo No. 63896, released July 12, 1996 at 1 ("Lottery Notice").

consideration of any pending litigation concerning the initial selectees' disqualification before conducting an auction for a market.

I. THE BUDGET ACT AUTHORIZED THE COMMISSION TO AWARD INITIAL LICENSES BY COMPETITIVE BIDDING

With the passage by Congress of the Budget Act, the Commission was granted express authority to employ competitive bidding procedures to choose among mutually exclusive applications for initial licenses. In implementing its auction authority, the Commission's goals were to 1) award licenses through a process that will promote competition; 2) award licenses to parties who will provide service and use spectrum most efficiently; and 3) award licenses expeditiously.⁴ In furtherance of these goals, the Commission determined that it would award all mutually exclusive applications for initial licenses in the Public Mobile Services filed after July 26, 1993 by competitive bidding.⁵

In its 1994 *MO&O* in the Competitive Bidding proceeding, the Commission determined that it would use random selection procedures to select from mutually exclusive unserved area applications filed before July 26, 1993.⁶ The Commission's decision was largely based on the Special Rule adopted by Congress in Section 6002(e) of the Budget Act. This Special Rule prohibits the awarding of licenses by random selection if mutually exclusive applications were

⁴ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 F.C.C.R. 2348, 2349 (1994) ("Second Report and Order").

⁵ *Id.*, at 2359.

⁶ *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, PP Docket No. 93-253, *Memorandum Opinion and Order*, 9 F.C.C.R. 7387, 7390 (1994) ("MO&O").

accepted *after* July 26, 1993.⁷ Thus, the Commission concluded that if applications for an initial license were accepted before July 26, 1993, Congress intended that random selection procedures be used to award that license.

The Commission relied on the Conference Report to the Budget Act, which singled out pre-July 26, 1993 applications in the IVDS services as examples of applicants for whom the Commission should use lotteries.⁸ The Commission inferred from this legislative history that equitable factors, such as fairness to pending applicants and administrative costs and efficiency, justified the use of lotteries for those applicants who, in reliance on the Commission's existing lottery procedures, had filed applications prior to July 26, 1993.⁹

When the Commission reviewed the applicability of competitive bidding for unserved area applications, it was evaluating procedures for applications that for the most part have been filed with the Commission within the past two years. Moreover, applications for unserved areas are just for a portion of a market, while applications for complete RSAs are for entire markets. As stated by CCPR in its Petition, the concerns expressed by the Commission regarding the viability of auctioning unserved areas and their ability to produce equitable results, are inapplicable to the typical RSA.

Comparing the equitable factors the Commission sought to balance in 1994 for portions of a market with the equitable factors the Commission seeks to balance today for entire markets, the Commission can only conclude that the public interest will best be served by adopting

⁷ See Budget Act, Pub. L. No. 103-66, § 6002(e), 107 Stat. 312, 397 (1993); *Second Report and Order*, 9 F.C.C.R. at 2359, n.55; *MO&O*, 9 F.C.C.R. at 7389.

⁸ *MO&O*, 9 F.C.C.R. at 7391.

⁹ *Id.*

competitive bidding procedures for these remaining unlicensed markets. The Commission is determining the fate of applications filed for the most part more than eight years ago and to date no initial cellular licensee has been granted for these markets. The licensing process has grown stale and should be given a fresh start under the competitive bidding system. Considerations of administrative cost and efficiency weigh heavily in favor of auctioning these licenses instead of continuing to use a process that has failed to result in license awards after eight years.

Moreover, given the passage of time, the fairest result for pending applicants would be to move to a speedy resolution of these licenses through auctions, instead of generating further litigation and delay by giving the license away, potentially to a speculator in a lottery.

In some outstanding RSAs, the Commission has awarded various entities interim operating authority so that at least some communities within these markets can obtain limited cellular services. The public deserves to have long-term committed licensees committed to fully building out the market and providing service to the community. They deserve the ability to obtain quality and reliable service from an entity dedicated to providing such service. As has been demonstrated by the recent use of competitive bidding in the broadband personal communications services ("PCS") context, competitive bidding results in the delivery of rapid service to the public by an entity dedicated to providing such service. Eight years is long enough. Any concerns regarding the balancing of equities and administrative costs are far outweighed by the need to rapidly provide quality competitive services to these outstanding RSAs.

Additionally, the interim operators, and others with a sincere interest in providing service to the outstanding markets should be given an opportunity to provide full service to these yet-to-

be-licensed markets. By requiring the filing of FCC Form 175 for the competitive bidding process, the Commission's provision of competitive bidding will not contradict the spirit of the Special Rule established by Congress. In addressing the concerns of Congress and the Commission regarding the reliance by applicants' on the Commission's existing lottery process, CCPR correctly points out that no single applicant for these remaining markets, which are mostly non-wireline markets, could have reasonably expected to be the lottery winner. For example, as cited by CCPR, in the Ceiba, Puerto Rico market there were 491 applicants. In the markets where WWC's subsidiaries are currently the interim operators, there was an average of 551 applications. The chances of winning were minimal, as are the chances that many of these applicants are still viable and even in existence. Given the recent introduction of competition to the cellular industry by PCS and in some instances, by specialized mobile radio ("SMR") services, it is unlikely that an individual applicant with no industry background other than its single application can rapidly provide quality services to these communities. All that a lottery will accomplish is to grant a speculator the ability to reap a windfall by selling a license to a company economically motivated to provide service in these markets — the company most likely to win the license in an auction.

In its recent *Ninth Report and Order* in the Competitive Bidding proceeding, the Commission determined that "[i]n markets where a cellular unserved area license was granted under the lottery process, and the license was canceled for failure to construct or was later revoked, the unserved area reverts to the Commission for licensing. *In these instances, we will accept applications for the unserved area under the new rules adopted herein and select the*

*licensee by auction.”*¹⁰ The situation of initial licenses for unserved area is analogous to the situation at hand regarding initial licenses for RSA markets where, prior to July 26, 1993, *a lottery was conducted and the tentative selectee was dismissed, failed to construct within 18 months, or had its application granted and the license later revoked due to violations of the Commission’s rules.*¹¹

A lottery has already been conducted for the remaining RSA markets. The remaining applications for initial RSA construction permits have no rights to a second lottery because their applications have already been prosecuted using the existing “rules of the game” at the time. In effect, the initial applicants in these markets have had their chance at winning the lottery and lost. These applications have been dismissed and are no longer pending before the Commission and thus the licenses must be awarded under the Commission’s auction authority as required by Congress. The Congressional intent and public interest will be thwarted should the Commission decide to conduct lotteries using applications that are nothing more than sham entities attempting, at the time they were filed, to profit from “government giveaways” with no interest in providing cellular service to the public.

Applications for the remaining unlicensed cellular markets were filed with the Commission approximately eight years ago. By employing competitive bidding procedures to award these licenses, the Commission will meet its goals of 1) providing competition; 2) awarding licenses to parties who will provide service and use spectrum most efficiently; and 3)

¹⁰ *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, PP Docket No. 93-253, *Ninth Report and Order*, FCC 96-253, para. 4 (Nov. 7, 1996).

¹¹ *See In re Application of Algreg Cellular Engineering*, 9 F.C.C.R. 6753 (1994)(review pending).

awarding licenses *expeditiously*. The time has come for these 23 markets to finally have a permanent cellular licensee that will provide the public with the quality service they should have received eight years ago.

II. THE COMMISSION MUST DECIDE ALL PENDING PETITIONS FOR REVIEW OR RECONSIDERATION REGARDING THE SUBJECT MARKETS BEFORE HOLDING AN AUCTION

It is imperative the Commission issue a final decision regarding the disposition of the initial lottery winner's applications, currently under review as part of the Risk Sharing proceeding, and allow judicial review to be completed, prior to scheduling any auctions for these RSA markets.¹² In order to ensure prevailing market prices are bid and that only legitimate parties, intent on providing service to the public, will participate, the Commission must not auction off licenses conditioned on the outcome of the Risk Sharing and other proceedings. Should the Commission decide to conduct auctions for these markets while the status of the initial licensee or tentative selectee is still dependent upon the outcome of appeals with the courts or the Commission, the bidding entities will lack the incentive to submit rational bids, because of the possibility of losing the license later. Moreover, it is highly likely that any winning bidder for the subject markets will have a Petition to Deny filed against them by the applicant whose initial application remains subject to review at the courts or the Commission.

¹² Accordingly, WWC urges the Commission to expedite its consideration of the Risk Sharing case and, following issuance of a decision, to urge any reviewing court to accelerate review. If the Commission chooses not to wait until final resolution of judicial review or litigation, it may decide to conduct the auctions and defer the required payments until after any condition on the license is satisfied. This conditional licensing system, however, will deter bidders from bidding the full value of the license since they do not know the final outcome of the pending litigation.

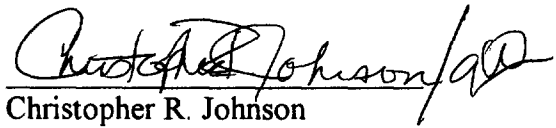
This will further complicate and delay the Commission's process of awarding a permanent license in these remaining markets and finally providing long awaited service to the public.

CONCLUSION

For the foregoing reasons, WWC hereby submits that the time has come for the Commission to finally provide the remaining cellular markets with rapid and efficient cellular service via competitive bidding without any conditions on the awarded licenses.

Respectfully Submitted,

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November 25, 1996